United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

FOR MR. JUSTICE VAN ORSDEL.

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1908.

No. 1964. 609

FLORENCE HUNT DE WINTER AND NICOLAS DE WINTER, APPELLANTS,

vs.

HENRY G. THOMAS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED OCTOBER 28, 1908.

Argued Dec. 8/1908

e.f.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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No. 1964.

FLORENCE HUNT DE WINTER AND NICOLAS DE WINTER, APPELLANTS,

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1908.

In the Court of Appeals of the District of Columbia.

No. 1964.

FLORENCE HUNT DE WINTER ET AL., Appellants,
vs.
HENRY G. THOMAS.

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a Supreme Court of the District of Columbia.

Equity. No. 27793.

HENRY G. THOMAS, Complainant,
vs.
FLORENCE HUNT DE WINTER and NICOLAS DE WINTER, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

1 *Bill of Complaint.*

Filed May 14, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 27793.

HENRY G. THOMAS, Complainant,
vs.
FLORENCE HUNT DE WINTER and NICOLAS DE WINTER, Defendants.

To the Supreme Court of the District of Columbia, holding an Equity Court:

The complainant represents unto the Court as follows:

1. That he is a citizen of the United States and a resident of the District of Columbia and brings this suit in his own right.

2. That he is informed and believes that the defendants, Florence Hunt De Winter and Nicolas De Winter, are citizens of the United

States and are now residing in the District of Columbia. That they are sued in this action in their own rights.

3. That he is a member of the Bar of the Supreme Court of the District of Columbia and was such member at the time of the transactions hereinafter mentioned.

4. That Jennie De Witt Talmage by her last will and testament dated the 24th day of December, 1902, bequeathed to the
2 defendant Florence Hunt De Winter (by her maiden name, Florence Hunt) certain legacies; that said will was filed in the office of the Register of Wills for the District of Columbia on the first day of August, 1906; that under the provisions of the said will the said Florence Hunt De Winter, except as to some small bequests of wearing apparel and jewelry, was in the position of residuary legatee; that on the fourth day of September, 1906, the complainant was retained by the said Florence Hunt De Winter to represent her in a proposed compromise suggested by the executor of the said will and his counsel as the only means of avoiding a contest of the will; that a contract in writing, dated the 24th day of October, 1906, was entered into between the complainant and the defendants, Florence Hunt De Winter and Nicolas De Winter, whereby the said defendants retained the complaint to represent the said Florence Hunt De Winter in the matter aforesaid until final settlement or distribution under the will or until final settlement should be effected by compromise or by judgment or decree of Court, and that in and by the said contract, which bears the genuine signatures of the defendants, the said Florence Hunt De Winter agreed and promised to pay to the complainant a certain percentage of the specific sum received by her under the said will or by compromise, all of which will appear from a copy of the said contract filed herewith marked "Exhibit A" and prayed to be taken as a part hereof.

5. That the complainant faithfully performed his part of the said contract; that he succeeded in averting a compromise or con-
3 test, and that the said will was admitted to probate and record by the Supreme Court of the District of Columbia on the third day of January, 1907, and is case number 14,015, Administration; that distribution was made under the provisions of the said will as of March 1, 1908; that said defendant Florence Hunt De Winter received as shown by the first and final account of the executor filed in said cause, approved by the Court March 6, 1908, the sum of thirteen thousand, one hundred, sixty-one and forty-one hundredths dollars ($13,161.41) in cash and real estate notes, due April 1, 1908, accepted by her in lieu of cash, and other personal property of the value of sixty-five dollars.

6. That by and under the provisions of the said contract the said Florence Hunt De Winter promised and agreed to pay to the complainant as compensation for his professional services fifteen per centum of the sum of money received by her under the provisions of the said will; that the compensation thus agreed to be paid out of the fund received amounts to one thousand, nine hundred, seventy-four and twenty-one one hundredths dollars ($1974.21); that no part of this sum has been paid.

7. Your complainant is advised by counsel and believes and on

such advice and belief charges that by reason of the facts herein stated and by reason of the contract between himself and the said defendants he is entitled to fifteen per centum out of the said specific fund received by the said Florence Hunt De Winter, and
4 that the extent and amount of his interest therein became fixed and determined, upon the approval by the Court of the first and final account of the executor under the said will, at the sum of one thousand, nine hundred, seventy-four and twenty-one one hundredths dollars ($1974.21), and that he has to that extent an equitable lien upon, or interest in, the said fund; that the said defendants, Florence Hunt De Winter and Nicolas De Winter, had at the time of receiving the said fund no other money or property.

8. That after the performance by the complainant of the services necessary to secure the rights of the defendant Florence Hunt De Winter, the said defendant called at the office of the complainant and told him that in the matter of securing a loan which she desired it was necessary that the attorney for the parties who offered to make the loan should examine into the matter of her interest under the said will; that she had given the said attorney complainant's card and told him that complainant represented her in the matter and whatever information he desired he could get from complainant; that said attorney never called upon nor communicated with the complainant; that shortly after this conversation the said Florence Hunt De Winter called the complainant by telephone and told him that the attorney aforesaid had informed her that complainant did not represent her in the matter at all, and during the same conversation by telephone said defendant told the complainant that she was being urged to sign some papers the meaning of which she
5 did not know, and that she would take no step without consulting complainant and made an appointment with him; that the same day or the next day the said defendant called at the office of the complainant with a man whom she introduced to him under a fictitious name as an old friend of her family, but who, as complainant afterwards learned from the man himself, is a brother of the said defendant by the name of George Hunt; that at the request of the said defendant and the said George Hunt the complainant discussed with them the matter of the interest of the said defendant under the will aforesaid; that they expressed their entire satisfaction concerning the progress of the matter up to that time and inquired particularly as to the probability of any thing arising in the future to deprive said defendant of her rights under the said will, and that they were told by complainant that he believed her interest was safe, that in his judgment nothing was seriously in contemplation or would be attempted by the heirs that need cause her any alarm, that he was prepared to meet any step that might be taken, but felt reasonably sure that nothing then remained to be done except to keep in close touch with the matter and to wait for a distribution under the will; that at this interview the said defendant told the complainant that in the matter of the loan or advance the attorney aforesaid had come into the case representing her friends, that she regretted the situation and did not understand it at all and

had no idea of employing other counsel in the matter generally and would confer with complainant and keep him advised as to
6 what was going on; that during this conversation the defendant Florence Hunt De Winter did not discuss fully the matters mentioned over the telephone prior to this call and concerning which the appointment was made, and that on leaving complainant's office after this conversation, she told him she would call again shortly; that she never came to his office again and has since refused or failed to answer his communications or to confer with him, without giving him any reason whatever for her conduct, but that notwithstanding this the complainant was, and tendered himself, at all times ready and willing to confer with and advise her in the matter; that a short time after the interview aforesaid the said George Hunt and the defendant Nicolas De Winter called at the office of the complainant and asked him for certain information and told him that the defendant Florence Hunt De Winter was ill in bed and that she would call to see complainant as soon as she was able to be out.

9. That in an action at law growing out of the transactions hereinbefore mentioned the defendants have filed an affidavit which is false in toto, the effect of which is to postpone action in the matter for a year or more.

10. That the defendant Florence Hunt De Winter has told the complainant that she would remain in Washington only temporarily, that she came here to attend to certain matters of business and that she intended to leave this city as soon as they were closed; that prior to coming here the defendants resided in New York City, and that said Florence Hunt De Winter had for several years been on
7 the stage in the theatrical profession.

11. That the defendants have no property except the particular fund received under the will aforesaid, and that from the actions of the defendants subsequent to the performance by the complainant of the services required of him under the contract aforesaid in refusing to answer complainant's communications or to further confer with him, and from this time employing other counsel and by reason of the defendants' false affidavit aforesaid and by reason of other acts and things herein stated the complainant believes that the defendants intend to fraudulently and wrongfully defeat his claim and deprive him of his rights in the premises, and that they will, unless restrained, transfer, secrete or remove said fund from the District of Columbia and place it beyond the jurisdiction of this Court and beyond the reach of the complainant; and unless the injunction hereinafter prayed for be granted the complainant will suffer irreparable injury and that his rights will be unduly prejudiced if notice is given to the defendants before the writ issues.

Wherefore the premises considered, the complainant prays:

First. That the United States Writ of Subpœna may issue directed to the defendants, Florence Hunt De Winter and Nicolas De Winter, commanding them to appear on a day named therein and answer the exigencies of this bill.

Second. That the defendants their agents and attorneys may be restrained *pendente lite* from transferring, secreting, removing, dissipating, or in any manner disposing of the fund described in the complainant's bill to such an extent as to leave the balance of the said fund within the jurisdiction of this Court and subject to its process less than the amount of the complainant's claim together with interest and costs, to wit: the sum of twenty-four hundred dollars ($2400.00).

Third. That a Receiver *pendente lite* may be appointed by this Court to receive, collect and take charge of the said sum of twenty-four hundred dollars ($2400.00) and to dispose of said sum as this Court may hereafter direct. And that the said defendants be ordered to pay over to said Receiver immediately upon his appointment and qualification the said sum of twenty-four hundred dollars ($2400.00).

Fourth. That the complainant may be adjudged and decreed to have a lien upon or interest in the fund described in the bill of complaint herein to the amount of fifteen per centum of said fund, to wit: the sum of one thousand nine hundred seventy-four and twenty-one one hundredths dollars ($1974.21), with interest thereon from the first day of March, 1908, at the rate of six per centum per annum, and that the said Receiver be directed, after paying the costs herein, to pay said sum, with interest, to the complainant.

Fifth. For such other and further relief as may to the Court seem just and proper.

The defendants to this bill are Florence Hunt De Winter and Nicolas De Winter.

HENRY G. THOMAS.

J. W. BELLER,
Solicitor for Complainant.

DISTRICT OF COLUMBIA, *ss:*

I, Henry G. Thomas, on oath, say that I am the complainant in the above entitled cause, that I have read the foregoing bill by me subscribed, and know the contents thereof, and that the matters and things therein stated of my own knowledge are true, and those stated upon information and belief I believe to be true.

HENRY G. THOMAS.

Subscribed and sworn to before me this thirteenth day of May, A. D., 1908.

[NOTARIAL SEAL.] WALTER C. ENGLISH,
Notary Public, D. C.

10 EXHIBIT "A."

Filed May 14, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. —.

HENRY G. THOMAS, Complainant,
vs.
FLORENCE HUNT DE WINTER and NICOLAS DE WINTER, Defendants.

Memorandum of agreement, made and entered into this 24th day of October, 1906, by and between Florence Hunt De Winter, nee Florence Hunt, and Nicolas De Winter, late of the City of New York, but now residing in the City of Washington, District of Columbia, parties of the first part, and Henry G. Thomas, attorney at law, of the City of Washington, District of Columbia, party of the second part, Witnesseth:

Whereas, Jennie De Witt Talmage, by her last will and testament, bequeathed to the said Florence Hunt De Winter (by her maiden name, Florence Hunt) certain legacies; and,

Whereas, a controversy has arisen, and, having been informed by the executor and his counsel that an attack upon the will is threatened, the said parties of the first part are desirous of retaining and employing the professional services of the said party of the second part, as such attorney at law, to represent the said Florence Hunt De Winter in the matter until final settlement thereof;

11 Whereas, the said party of the second part is willing to accept the employment upon a fee contingent upon success, such arrangement being especially desired by the parties of the first part:

Now therefore it is hereby mutually agreed by and between the said parties of the first part and the said party of the second part as follows:

1. The said parties of the first part do hereby retain and employ the professional services of the said party of the second part to represent the said Florence Hunt De Winter in the matter aforesaid until final settlement or distribution under the will, or until final setlement is effected by compromse or by judgment or decree of Court. And in consideration of said services the said Florence Hunt De Winter agrees and promises to pay to the said Henry G. Thomas the following fees, contingent upon success in the matter:

(*a*) In case of distribution under the will as it stands or in case of compromise before caveat is filed, fifteen per centum (15%) of the sum of money and a sum equal to fifteen per centum of the market value of any other property received by her under the distribution or compromise.

(*b*) In case of compromise after caveat is filed and answered, and before trial is begun, twenty per centum (20%) of the sum of

money and a sum equal to twenty per centum of the market value of any other property received by her thereunder.

12 (*c*) In case of a trial and final success in the lower Court, whether the trial ends by compromise or otherwise, twenty-five per centum of the sum of money and a sum equal to twenty-five per centum (25%) of the market value of any other property received by her.

(*d*) In case of an appeal to the Court of Appeals and final success therein, twenty-five per centum (25%) of the sum of money and a sum equal to twenty-five per centum of the market value of any other property received by her, and Two Hundred and Fifty Dollars additional.

(*e*) In case of an appeal to the Supreme Court of th- United States and final success therein, twenty-five per centum of the sum of money and a sum equal to twenty-five per centum (25%) of the market value of any other property received by her, and Five Hundred Dollars additional.

2. And the parties of the first part agree to pay any and all costs that may be taxed against them in the event of any proceeding in Court in connection with this matter, and to pay all expenses of the party of the second part in connection herewith incurred with their approval.

This agreement is to cover all past services in connection with this matter, as well as all future services.

Witness our hands and seals this 24th day of October, 1906.

(Signed)

MRS. FLORENCE HUNT DE WINTER. [SEAL.]
NICOLAS DE WINTER. [SEAL.]

13 *Amendment to Bill.*

Filed May 15, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 27793.

HENRY G. THOMAS, Complainant,
vs.
FLORENCE HUNT DE WINTER and NICOLAS DE WINTER, Defendants.

Amend paragraph five of said original bill by adding thereto a sub-paragraph as follows:

That complainant avers on information and belief that the said fund is now within the jurisdiction of this Court.

HENRY G. THOMAS.

Amended May 15, 1908, 10:10 A. M.
J. W. BELLER,
Solicitor for Complainant.

I, Henry G. Thomas, complainant in the above-entitled cause on oath say that the foregoing averment filed as an amendment to the Original Bill, filed herein on the 14th day of May, 1908, is true to the best of my knowledge and belief.

HENRY G. THOMAS.

Subscribed and sworn to before me this 15th day of May,
14 A. D. 1908.

[NOTARIAL SEAL.] LLOYD A. DOUGLASS,
Notary Public, D. C.

Demurrer.

Filed May 21, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 27793.

HENRY G. THOMAS, Complainant,
vs.
FLORENCE HUNT DE WINTER and NICOLAS DE WINTER, Defendants.

These defendants, Florence Hunt De Winter and Nicolas De Winter, by protestation, not confessing nor acknowledging all or any of the matters and things in the bill of complaint contained to be true in such manner and form as the same are therein alleged and set forth, do demur thereto, and for cause of demurrer show:

1. That the said bill contains no equity whereon this Court can grant any decree, or give complainant any relief against the defendants, or either of them.

2. That said bill is multifarious, in that it appears from the allegations thereof that defendant Nicolas De Winter is not a proper party to said bill.

3. That it appears from the allegations of said bill that
15 there is now pending a suit at law, which was instituted prior to the filing of said bill, and upon the same cause of action.

4. That said bill is too vague, indefinite and contradictory to permit of any decree being founded thereon.

Wherefore the defendants crave judgment of this Court whether they shall make answer to the said bill otherwise than as aforesaid.

And they pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

FLORENCE HUNT DE WINTER.
NICOLAS DE WINTER.

I, P. H. Marshall, solicitor for the defendants, Florence Hunt De Winter and Nicolas De Winter, hereby certify that in my opinion the foregoing demurrer is well founded in law.

P. H. MARSHALL,
Solicitor for Defendants.

DISTRICT OF COLUMBIA, *ss:*

Florence Hunt De Winter and Nicolas De Winter, being first duly sworn, depose and say that they are the defendants to Equity Cause No. 27793, in the Supreme Court of the District of Columbia, and that this demurrer is not interposed for the purposes of delay.

FLORENCE HUNT DE WINTER.
NICOLAS DE WINTER.

16 Subscribed and sworn to before me this 19 day of May, A. D. 1908.

[NOTARIAL SEAL.]

HOWARD BOYD,
Notary Public, D. C.

To J. W. Beller, Esq., Solicitor for complainant:

Please take notice that the foregoing demurrer will be calendared for the next Term of Court.

P. H. MARSHALL,
Solicitor for Defendants.

Service of foregoing demurrer and notice, by copy, acknowledged this 21st day of May, 1908.

J. W. BELLER.

Decree.

Filed October 13, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 27793.

HENRY G. THOMAS, Complainant,
vs.
FLORENCE HUNT DE WINTER and NICOLAS DE WINTER, Defendants.

17 This cause came on to be heard at this Term on the original bill and the amendment thereof and the demurrer thereto and was argued by counsel, upon consideration whereof, it is this 13th day of October, 1908, ordered, adjudged and decreed that said demurrer be and the same is hereby overruled; and the defendants elect to stand upon said demurrer and to proceed no further in this Court with said cause; whereupon it is further ordered, adjudged and decreed that the complainant has a lien upon the fund described in the bill of complaint to the amount of fifteen per cent. of said fund, to wit, the sum of one thousand nine hundred seventy-four dollars and twenty-one cents ($1,974.21), with interest thereon from the first day of March, 1908, and that the defendants pay to the complainant out of the fund described in said bill of complaint the said sum of $1,974.21, with interest thereon from the first day of March, 1908, together with the costs of this suit to be taxed by the clerk of the Supreme Court of the District of Columbia, and that the complainant have execution as at law.

The defendants and each of them note an appeal in open court from this decree, and the penalty of the bond to be given by them

on said appeal is hereby fixed at $100 for a cost bond, and $2,500.00 for a supersedeas bond, with surety to be approved by the Court.

WRIGHT, *Justice.*

18 *Memorandum.*

October 15, 1908.—Appeal bond filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed October 15, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 27793.

HENRY G. THOMAS, Complainant,
vs.
FLORENCE HUNT DE WINTER ET AL., Defendants.

The Clerk of the Court will please prepare transcript of record for the Court of Appeals in the above styled cause, to include the following:

Original bill, and amendment thereof and exhibit thereto.
Demurrer.
Final Decree.
Memorandum of filing supersedeas bond on appeal.
Praecipe for transcript of record.

P. H. MARSHALL,
Solicitor for Defendants.

19 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 18, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 27,793, Equity, wherein Henry G. Thomas, is complainant, and Florence Hunt De Winter, *et al.,* are Defendants, as the same remain upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 26th day of October, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1964. Florence Hunt De Winter, *et al.,* appellants, *vs.* Henry G. Thomas. Court of Appeals, District of Columbia. Filed Oct. 28, 1908. Henry W. Hodges, Clerk.

Court of Appeals, District of Columbia

NO. 1,964

FLORENCE HUNT DE WINTER
AND NICOLAS DE WINTER, APPELLANTS,
vs.
HENRY G. THOMAS.

Appellants' Brief on Rehearing.

P. H. MARSHALL,
Solicitor for Appellants.

THE SAXTON PRINTING CO.

In the Court of Appeals of the District of Columbia

FLORENCE HUNT DEWINTER AND NICOLAS DEWINTER, *Appellants,*
vs.
HENRY G. THOMAS.
} No. 1964

APPELLANTS' BRIEF ON REHEARING.

Appellee, in his brief for rehearing, devotes considerable space to an effort to convince this court that he entered into the fee contract with appellants "looking to the fund for his compensation," and not the personal responsibility of appellants. The idea which he seems to have in mind, and which he emphasizes throughout his brief, is that the agreement upon which he filed this suit, while not amounting to an equitable *assignment,* creates an equitable *lien,* because he contends appellee contracted upon the faith and credit of the fund, and not the personal responsibility of appellants.

Counsel for appellants has been unable to find any authorities holding that an equitable lien can arise in cases of this kind without an equitable assignment, and on the contrary the case of Trist *vs.* Child, as well as the other authorities cited on page 4 of appellants' original brief, hold that the lien cannot exist where the contract falls short of an assignment. Assuming, however, that a lien can be created though the agreement creating it does not

amount to an equitable assignment, let us see if appellee did, as a matter of fact, look to the fund and not to the personal responsibility of appellants; and to determine this it becomes important that the court look at the contract and the bill to see whether they throw any light on this point.

(*a*) It appears from the bill, paragraph 4 (Rec., p. 2) that appellant Nicolas DeWinter had no personal interest in the legacy, and that it belonged exclusively to his wife. As Nicolas DeWinter would not receive the legacy and had no interest in it, the contract, so far as he is concerned, must have rested upon purely personal considerations, and the very fact that he was made a party to the agreement, when his personal responsibility was all that could secure his observance of its terms, negatives the idea that appellee was looking solely to the security of the legacy when he procured the contract to be executed, or had in mind that the only way to protect himself was to charge the legacy with the payment of his fee.

(*b*) The agreement itself (Rec. p. 6) discloses that appellee, on certain specified contingencies, was to receive definite sums varying from, $250 (Sec. *d* of Par. 1, Rec., p. 7) to $500 (Sec. *e*, of same). It is not pretended that any lien was contemplated or created with reference to these payments, or as to the costs and expenses contracted to be paid by appellants, or the percentage of the market value of "any other property received by her." Therefore, in considering the question of whether appellee at the time of the making of the agreement looked to the security of the legacy for his compensation, it is at once apparent that he evidently did not look to it for a very substantial part thereof; and as these definite sums of money, for instance, were to be paid to him under certain conditions, which the parties expected to arise, (the agree-

ment reciting that "an attack upon the will is threatened") and upon performance by him of much professional labor, and no reason is shown, or can be urged, why he should not have been equally as desirous of having security for the rewards of that labor as for any other service which he might render, it must be evident that if he had, as contended in his brief, "looked to the fund for compensation," he would have looked to it for his entire compensation, and not merely for a *part* of it, and been content to accept the personal responsibility of appellants for one part and not for another.

On the contrary, the only reasonable interpretation of the agreement is that his fee was to be ***regulated*** by the *nature and exteni of the services* and *the amount received by Mrs. DeWinter,* and that the provision for a percentage of the latter was merely intended to make the fund the "basis of computing the fee," as said by this court in its opinion of January 5, 1909. Any other interpretation involves the absurdity of holding that appellee looked to the fund for a portion of his fee, but not for the rest, (as to which latter he evidently considered the personal responsibility of appellants all sufficient) without any reason to account for his making such distinction. And the language of the agreement is that Florence Hunt DeWinter agrees "to pay to the said Henry G. Thomas the *following fees,*" showing that the object was the regulation of the amount of the compensation, and not the creation of a lien.

(*c*) There is absolutely nothing in the record suggesting that *at the time this agreement was made,* appellants were not financially responsible, or that appellee had any reason to, or did, consider the personal contract of both or either of them, insufficient. The bill alleges (Par. 7, Rec., p. 3) that the said defendants, Florence Hunt DeWinter and Nicolas DeWinter, had *at the time of re-*

ceiving the said fund no other money or property." In paragraph 11 (Rec., p. 4) it is alleged "That the defendants *have* no property except the particular fund, etc. So far as these allegations are concerned, they may be true, and yet *when the agreement was made* appellants' possessions and expectations may have been such as to cause appellee to rely uopn their personal agreement, and he has stated nothing to the contrary. As this is a hearing on demurrer to the sufficiency of the bill, the court will not consider anything as true unless it is alleged, for the demurrer admits only the facts alleged.

The fact that the fee was contingent throws no light upon the situation, for many times attorneys accept cases upon contingent fees, not because clients are unable to pay otherwise, but because they will pay at a higher rate when they risk nothing.

(*d*) The bill, paragraph 9 (Rec., p. 4) shows that appellee sued appellants at law in relation to this same transaction. He must therefore have proceeded against them on the theory of their personal liability, and thereby has placed his own interpretation on the contract. The affidavit referred to in said paragraph must be in answer to one by appellee under the 73rd Rule, and in his affidavit he has set out and relied upon the *personal promises* of appellants.

(*e*) It is also most significant that the agreement itself contemplates the receipt of the legacy by Florence Hunt DeWinter and subsequent payment by her to appellee of his fee. *If what the appellee had in mind was his protection by charging the fund itself with the payment of his fee, why was the contract so framed as to place that very fund in her possession, and thereby destroy the value of the security he claims now to have contemplated?* One of the extraordinary features of the present case, in which it appears to be without precedent, is that a lien

is sought to be established upon funds *in the pocket of defendant,* from whence a suit at law would be equally as adequate to remove them. In all other cases discovered by the writer, as for example the Ingersoll case, the fund was in the hands of an administrator or other third person when sought to be subjected to the alleged lien, and the bill contemplated that if it should be allowed to be paid over to the owner, the benefit of the lien would be lost.

And appellee cannot urge that he intended a different result from that accomplished, for the record shows that he is a lawyer, and he must be supposed to have known what he was about.

It would have been a simple matter for him, with his legal knowledge, to have created a lien on this fund in unmistakable terms, and in the hands of the administrator of the estate, and as he did not do so, the only inference is that he did not intend to bind the fund, but was seeking merely a definite understanding as a basis for computing his fee. He agrees that she shall get the fund into her possession, and shall then pay to him his fee, and in the face of that now claims that he did not and would not rely upon her personal honesty or responsibility, and was seeking *security!* It was an agreement similar to this that was considered in Bromwell *vs.* Turner, 37 Ill., App. 561, where the court said (p. 563) "In this case the appellant could not perform literally the promise, without first receiving the money recovered," and therefore determined that no lien was contemplated.

It must be evident from the foregoing analysis that from all of the circumstances of this contract, as disclosed by the bill and the contract itself, there is absolutely nothing which would indicate that appellee procured its execution for the purpose of *securing* the payment of the compensation contracted for; but that on the contrary, the only reasonable construction of the agreement is that he

desired some definite understanding as to the *basis* upon which his fee should be adjusted, together with a distinct promise to pay certain sums for specified services. The importance of all inferences pointing away from, rather than toward, an intention to rely upon the fund as security will be considered later in connection with Ingersoll *vs.* Coram.

The suggestion on behalf of appellee that if the bill is defective in failing to state what the bequest to appellant was, how much money and how much other property, this court should remand the case to the auditor to ascertain the facts, is surely a novel proposition on demurrer. Complainant's bill is attacked as too vague and indefinite to permit of a decree being founded thereon, whereupon he says, if this be true, I ask the court to direct the auditor to make out a case for me! Why not ask the Chief Justice to examine the account of the administrator, and amend the bill in the particulars complained of? He shows no reason why he cannot amend his bill and set out the facts in detail, and the fact that he does show the existence of the administrator's account makes it evident that he can do so. If it were otherwise, he should have sought discovery. The record here shows the receipt by Florence Hunt DeWinter of "$13,161.41 in cash and real estate notes, due April 1, 1908, accepted by her in lieu of cash" (Rec., p. 2) and that "defendants have no property except the particular fund received under the will aforesaid" (Rec., p. 4). Whether she received $13,000 in notes and the balance cash, or what the items were, it is impossible to determine, and there is no allegation that the notes were good, or bad, or were paid, or renewed, or could be collected. Yet the decree (Rec., p. 9) directs the appellants to pay out of "said fund described in said bill of complaint," $1,974.21, with interest, from March 1, 1908, in spite of the fact that it may well be, on the record and in

fact, that appellants *cannot* obey such decree because they have not the necessary cash. Complainant should have set out the facts, or shown himself unable to do so, and then prayed the appropriate relief—if necessary, a sale of one or more notes. Why should the court refer the case to the auditor to do for complainant what he can do for himself, by way of amendment, especially when the demurrer is aimed at that defect in the bill? If the demurrer is well founded, it should be sustained, and complainant not permitted to escape the consequences of bad pleading by asking the court to hold that he is entitled to something, although through his own fault it is impossible to determine what, and then to find the facts and reform the decree to suit them. If this can be done, we might as well do away with pleadings, find the facts in the first instance, and then prepare the record to suit them. It is plain that this decree ought not to stand, as it may be impossible of performance, and as against Nicolas DeWinter is a palpable absurdity, for he never had this fund out of which the decree is to be paid. And while the court might modify the decree so far as he is concerned, because the impropriety of joining him in this bill appears from the facts before the court, yet a court will never pass a final decree in a case when there is want of sufficient proof upon which to base it, and upon the other question,—the character of the fund,—there is a total lack of facts before the court. Reed *vs.* Jones, 8 Wis., 216. To grant appellee's wish as to a reference to the auditor would be, in effect, to sustain the demurrer, and then deprive appellants of the benefit of that ruling, and of his right to have a sufficient bill filed against him before he is required to answer.

And the court will note that nowhere in the bill is it charged that either appellant had the fund at the time the bill was filed. The nearest approach to such an allegation

is that "the defendants have no property except the particular fund." * * * This was manifestly inserted, not with a view to charging that they had *this fund,* but to show that they had no *other* property, and one of the most necessary elements of appellee's case is thus left in uncertainty.

The allegation that appellee believes appellant will remove the fund from this District will not help him, because it merely states his frame of mind, and it may well be that they will not do so simply because they cannot, not having the fund.

Trist vs. *Child.* The contention of appellee that this case does not decide the question of equitable lien as involved in the case at bar, can only be on the theory that the Supreme Court did not mean what it said, for the opinion states, (p. 446): "The bill proceeds upon the grounds of the validity of the original contract, *and a consequent lien* in *favor of complainant upon the fund appropriated.* We shall examine the *latter ground* first. Was there, *in any view of the case, a lien?* Further on the court said "viewing the subject in the light of these authorities, we are brought to the conclusion that the appellee had *no lien* upon the fund here in question." * * * "If there was no *lien* there was no jurisdiction in equity."

Appellee urges that in the Trist case the Supreme Court was dealing solely with (to quote from his brief) "the promise by a debtor to pay a creditor out of a fund in the hands of a third party, and the distinction is drawn between a proper equitable assignment of a portion of the fund and a mere agreement to pay out of 'such a fund.'" It seems hardly necessary to say that the court was dealing with the case before it, and not with some hypothetical situation, or the discussion of an academic question, and that as the bill proceeded upon the ground of a *lien,* and

the court expressly determines the question of whether in any event (that is, admitting the validity of the contract) there was a *lien,* counsel's assertion is contrary to the expressed intention of the court. To hold that the court, on a bill which sought to establish a lien, was gravely considering something not germane to the issue and not decisive of it, is to impute to the supreme tribunal an unparalleled stupidity, especially when that court first announces its intention to pass upon that very question.

In spite of the fact that the Supreme Court stated that they would consider and dispose of the question of lien before and without reference to the question of the validity of the contract (and the expression, "Was there, *in any view of the case,* a lien," is susceptible of no other interpretation), appellee insists, on page 14 of his brief, that they first decided that there could be no lien because the contract was against public policy, and "had this point in mind, and had decided it, when they said in the opinion that the agreement was a mere personal one." If this be true, then the court, having decided that there could be no lien, gravely proceeded to the consideration of whether there was one. The statement of such a proposition demands its rejection.

The case of Stanton *vs.* Embrey, 193 U. S., 548, referred to by appellee, was a suit at law, and no question of lien was involved, the only point being the validity of a contingent fee.

That the court had the question of lien in mind in the Trist case is further shown by reference to Rogers *vs.* Hosack's, Exrs., 18 Wend, 318, cited with approval in the opinion. The contract or promise was to pay from moneys received from the French government, and the court held that "such an agreement does not create any lien either at law or equity." * * *

In Porter *vs.* White, 127 U. S., 235, the Supreme Court

held that no lien was created by an agreement contained in a power of attorney, and cites Trist *vs.* Child as authority for such conclusion. The power of attorney provided that the attorney for claimants of a fund from the United States should be entitled as compensation for his services and expenses in the prosecution of the claim to one-half of whatever sum might be awarded by the commission. The power of attorney was with full power of substitution, and Porter was substituted by Musser, the original attorney. On a proceeding in equity to impress the fund with a lien in favor of Porter, the court said (p. 244): "The power of attorney from the widow of Conrow to Musser, dated December 10, 1869, contains no assignment of any specific interest in the claim, and the substitution of Porter by Musser, indorsed on said power of attorney and dated July 4, 1870, only states that 'Richard H. Porter is substituted and authorized to act under the powers hereinabove given.' Under these views, the plaintiff has failed to establish any *equitable lien* on the Conrow fund, by showing any distinct appropriation of a part of that fund in his favor by the widow of Conrow, either directly or indirectly, or any agreement, direct or indirect, that the plaintiff should be paid out of that fund. Wright *vs.* Ellison, 1 Wall., 16; *Trist* vs. *Child,* 21 Wall., 441-447." *The court will note that the pages of the report of the Trist case cited above, i. e. 441-447, relate exclusively to the question of the existence of an equitable lien, and only this particular feature of the Trist case is cited as controlling the Porter case.* The subsequent portion of the Trist case, pp. 447 to 453, concerning the validity of the contract, is not cited.

This disposes of the assertion of appellee that "The Supreme Court has never cited the Trist case upon the point of an equitable lien," and it is to be noted that there was no question of public policy involved in Porter *vs.* White.

The decision, in effect, is that while Porter stood in the shoes of Musser, the latter had no lien.

The Porter case also disposes of the contention of appellee that the Trist case is more *obiter* as it affects the case at bar, although the language of the opinion is a sufficient refutation of that contention. And Pomeroy's Eq. (note to par. 1283), Jones on Liens (par. 48) and many other eminent authorities cited in appellant's original brief, differ with appellee on this point.

As said by this court in its opinion of January 5, 1909, "In the present case, the language used in the contract is identically the same as that used in the fee agreement under consideration in the case of Trist *vs.* Child," and if such language could not create an equitable lien in that case, it cannot in this.

The Supreme Court, in Dillon *vs.* Barnard, 21 Wall., 430, said (p. 439): "The present case, notwithstanding the largeness of the plaintiff's demand, is not different in its essential features from those cases of daily occurrence where the expectation of a contractor that funds of his employer derived from specific sources will be devoted to the payment of his services or materials is disappointed. Such expectation, however reasonable, *founded even upon the express promise of the employer that the funds shall be thus devoted,* of itself avails nothing in favor of the contractor. Before there can arise any lien on the funds of the employer, there must be, in addition to such express promise upon which the contractor relies, some act of appropriation on the part of the employer depriving himself of the control of the funds, and conferring upon the contractor the right to have them applied to his payment when the services are rendered or the materials are furnished."

In the case at bar there could be, at most, no more than a mere expectation founded on the express promise of the

employer that the fund should be devoted to the payment of appellee. The very language of the contract establishes this, viz: "And in consideration of said services the said Florence Hunt DeWinter *agrees and promises to pay to the said Henry G. Thomas the following fees,* contingent upon success:" * * * And as said in Dodge *vs.* Schell, 12 Fed. Rep., at p. 518, "There is no magic in the name attorney which conjures up a lien. It is the nature of the services and the control, actual or potential, which the mechanical or professional laborer has over the object intrusted to him which determines whether a lien is or is not conferred."

Wylie *vs.* Cox, 15 How., 416. This case was decided, not on demurrer, but after issue joined and a hearing. The report is vague as to the terms of the contract, but the court based its decision upon the pleadings and proofs, without setting forth what the evidence was, but merely the *conclusions* reached. At page 420 the opinion states "*The evidence proves* that complainant was to receive a contingent fee of five percentum, out of the fund awarded, whether money or scrip. This being the contract, it constituted a lien upon the fund, whether it should be money or scrip. The fund was looked to, and not the personal responsibility of the owner of the claim."

It will at once be apparent that the court was announcing its *conclusions* from the evidence before it, which is not attempted to be given in detail, and which showed that the fee was charged upon the fund by way of lien. The contract was an "understanding,"—doubtless verbal —and when established, showed that a lien was created. The fact that the fee was payable "out of the fund awarded," *whether money or scrip,* indicated that "something more" than a mere agreement to pay out of the fund was contemplated, while in the case at bar, the very promise is to pay a fee.

When it is seen that the terms of the contract are not given in the above case, and that the statements of the court are conclusions drawn from the evidence, it will readily be understood why it cannot be said to conflict in any way with the later decision of Trist *vs.* Child, and why the same court, in Ingersoll *vs.* Coram, cited both cases with approval. Wylie *vs.* Cox cannot be said to be against the contentions of appellants, because the complete facts are not given, and such as are stated distinguish that case from the Trist case and the one under consideration. Trist *vs.* Child is on all fours with the case at bar, and is cited as not in conflict with Wylie *vs.* Cox in the Ingersoll case.

Worthington *vs.* Hutchinson, 7 App. D. C., 548.

How appellee can go so far astray in his comments on above case, when the authorities cited in his original brief afford such a complete explanation of it, is surprising.

Mr. Worthington was employed to institute a suit at law, and it was agreed that his compensation should be 25 per cent. of the amount recovered. He recovered a judgment. That an attorney has a lien on a judgment recovered by him, for his fees, which attaches as soon as the judgment is rendered and is superior to all claims of attaching creditors, is too well established to require citation of authorities. And it is equally well settled that this lien may be either *quantum meruit*,—for the value of the services, or, where there has been an *express agreement* as to the compensation to be paid; in other words, where the parties have valued the services in advance, the lien attaches for the agreed amount. The fee agreement does not in any sense *create* the lien, for that exists where there has been no agreement at all, but it merely *regulates* the extent of the lien.

"An attorney has a lien on the judgment or decree ob-

tained by him, for services and disbursements in the case, whether the amount of his compensation is *agreed upon,* or depends upon a *quantum meruit.*" Renick *vs.* Ludington, 16 W. Va., 378.

"The attorney is entitled to a lien as against his client, because his labor and skill contributed to the judgment, and he has an interest in the judgment either to the amount of those, or for some other amount which he is entitled to claim, *by agreement* or on the *quantum meruit,* as the measure of his compensation." *In re* Wilson, 12 Fed. Rep., at p. 242.

"The attorney has a lien for his costs and compensation upon the judgment recovered by him. Such a lien existed before the code, and is not affected by any provision of the code. The lien exists not only to the extent of the costs entered in the judgment, but for *any sum which the client agreed his attorney should have* as a compensation for his services." Marshall *vs.* Meech, 51 N. Y., at p. 143.

"The attorney has a lien for the amount of his costs and *agreed compensation,* upon the judgment, and to that extent may be regarded as an equitable assignee of the judgment." Wright *vs.* Wright, 70 N. Y., at p. 100.

Of course this right of attorney's charging lien does not extend beyond judgments and decrees, and has no application in the case at bar. It is a special privilege extended to attorneys in certain specified instances, and is strictly limited to those particular instances, not even extending to a judgment rendered in a court not of record. Jones on Liens, par. 202.

Mr. Worthington having recovered a judgment in a court of record, his attorney's lien at one attached thereto, and as his client had previously agreed to pay him 25 per cent. of the recovery, the lien attached for that amount. The contract did not raise the lien, for Worthington had

that by reason of his emplyoment and services, and a lien for the *value* of his services would have existed had there been no fee contract. The effect of the fee agreement was merely to regulate the *extent* of the lien. The whole fund was brought into equity by a bill of interpleader filed by the judgment debtor, and this court merely gave Mr. Worthington what he had become entitled to as soon as the judgment was entered.

In addition, in the above case there was also an assignment, made as soon as the verdict was rendered and prior to any attachment, "expressly setting forth * * * that it was subject to the claim of Worthington and Dean to the amount of one-fourth thereof on account of a contract for legal services rendered in the prosecution of the suit." Quotation is from opinion of this court of January 5, 1909, in case at bar.

In Sanborn *vs.* Maxwell, 18 App. D. C., 245, the opinion shows that the agreement was that fee was to "constitute an interest" in the proceeds of defendant's claim. As said by this court in the opinion of January 5, 1909, the real question involved was the validity of the assignment of a part of a claim against the United States. This court referred to Dixon *vs.* Gordon, 11 D. C. App., 60, as authority for the conclusion that the agreement created a lien in the Sanborn case. In the Dixon case, the court said (p. 65): "His was not a mere promise to pay her out of the fund, whenever he might collect the same, but an offer, a promise, to assign her a present interest in the claim itself."

The only meaning which can be given to this language is that if there had been a mere promise to pay out of the fund when collected, no lien would have been created thereby, and in the case at bar, the language of the agreement is "*agrees* and *promises to pay* * * * the following fees * * * 15 per cent. of the sum of money

received by her." * * *

In Willoughby *vs.* Mackall, 1 App. D. C., 411, the agreement expressly provided for a lien, and in Arnold *vs.* Carter, 19 App. D. C., 259, the fund was in court and the court may always award attorney's fees out of a fund in its custody or control. C. Y. C., vol. 4, p. 1013. The case deals with the *retaining lien* of an attorney, on funds *coming into his hands.* This case is clearly distinguished in the opinion of Jan. 5.

Roberts *vs.* Consaul, 24 D. C. App., 551, is also a case where the contract, in terms, provided for a lien on the draft, and it was this lien that the court was asked to enforce *against the draft.*

Walker *vs.* Brown, 165 U. S., 654, was a case where certain bonds were pledged upon the express understanding that they were to secure a line of credit. It was distinctly agreed that the bonds should secure advances, and the sole object was to *furnish security.* The only way in which this could be accomplished was to charge the advances upon the bonds,—otherwise the transaction was a complete failure and the express intention of the parties was defeated.

The Supreme Court held that such intention arose by necessary implication from the terms of the agreement, and quoted Pomeroy to the effect that "every express executory agreement in writing, whereby the contracting party *sufficiently* indicates an intention to make some particular property, real or personal, or fund, therein described or identified, security for a debt or other obligation, or whereby the party agrees to convey or transfer or assign the property as security, creates an equitable lien upon the property so indicated." * * *

The correctness of this is beyond question, but it is foreign to the questions presented in the case at bar, for the intention indicated here, and in Trist *vs.* Child and

Porter v. White

Dillon *vs.* Barnard, was to regulate the amount of the fee, and not to obtain security. Surely appellee must be in error if he considers the Walker case as overruling Trist *vs.* Child, Dillon *vs.* Barnard and Porter *vs.* White, when the facts were so entirely dissimilar. And the Trist case is approved in the Ingersoll case, decided subsequent to Walker *vs.* Brown.

Ingersoll *vs.* Coram, 211 U. S., 335. This case is considered by appellee as opposed to Trist *vs.* Child, in spite of the fact that the court itself states that it is not.

It will be noticed at the outset that, like Wylie *vs.* Cox, the hearing was on the merits, after issue joined and proof taken. The opinion states: "The sufficiency of the agreement of August 17, 1891, to create a lien seems not to have been seriously questioned in the circuit court upon the agreement of the demurrer. * * *

"*On the final hearing* the effect of the instrument was contested, and the court adhered to its ruling, saying: 'Whether or not the particular agreement creates a lien is a matter of construction. In this case the fact that there was no primary personal responsibility on J. A. Coran specially serves to stamp the agreement in issue as declaring a purpose to create a lien. Therefore, on the whole, we hold that, *on this final hearing on bill, answer and proofs,* the bill must be sustained." At page 365 the court said: "Does this *evidence* establish the existence of a lien? The answer to this must be yes. It is manifest that payment to Ingersoll was dependent upon success, but it is equally manifest (from the evidence, of course) that he relied upon more than the personal responsibility of the parties." The court then reviews the evidence, that the heirs of Davis assigned to Root an interest in their respective shares, in which assignment it was recited that Root had undertaken to employ counsel, etc., and that the object was to compensate him for ser-

vices and expenses, future as well as past. Then they consider Ingersoll's letter to Root, of May 1st, in which he states: "But the real question is as to what I am to have in case of success, *and how that is to be secured,* i. e., what papers are necessary, etc." And later (p. 367) :"It is evident therefore that Ingersoll asked for *security in a definite and written form.* We do not think it can be said that he sought only a promise to pay. That followed from his employment, and besides, Coran stipulated against personal liability, but did obligate himself to pay out of the funds secured from the estate."

"It (the intention to create a lien) is confirmed by *excerpts from the letters of Root set out in the complaint and introduced in evidence.*" "And explaining the agreement he (Root) said that Ingersoll 'was to receive $100,000 from moneys collected from the Davis estate,' and assured Mrs. Ingersoll that he would do everything in his power to see that she received 'as much from that fund.' "

And in the argument of counsel, (p. 349) it is urged that "none of the acts set out in the bill of complaint, *done after Ingersoll's death,* created a lien."

It thus appears that the court had before it facts and circumstances from which the intention to create a lien was apparent, which are not present in the case at bar, and which plainly distinguish Trist *vs.* Child. The bill in the Ingersoll case was evidently pregnant with allegations of the circumstances of the making of the contract, that it was given in response to a request for *security,* excerpts from the letters of Root, and "acts done after Ingersoll's death," and when the complete record came before the court; they found the "something more" than the mere personal agreement of Trist *vs.* Child. The court expressly held that the facts satisfied the requirements of Wright *vs.* Ellison Trist *vs.* Child was held *not*

to fulfill the requirements of Wright *vs.* Ellison, and the court says the Ingersoll decision is not opposed to either.

Being identical with the Trist case, the one at bar must fall within the principles of that decision and not Ingersoll *vs.* Coran.

No facts are alleged in appellee's bill which bring him within the scope of the Ingersoll decision. On the contrary, all reasonable inferences from his allegations are against the conclusion that he sought security, or had in mind the creation of a lien. His object, evidently, was no more than the obtaining of a definite understanding as to the amount of his compensation, under the various contingencies which might arise.

And the allegations of the bill as to his interpretation of the contract cannot help his case, for, as said in Dillon *vs.* Barnard, 21 Wall., 430, "A demurrer to a bill in equity does not admit the correctness of averments as to the meaning of an instrument set forth in or annexed to the bill."

Appellee urges that because he manifestly did not attempt to secure the payment of a portion of his compensation, he must have sought security for the other portion. The significance of this is against his inference, and no rule of interpretation warrants such a conclusion.

The relief for which appellee really asks the court in this case is specific performance. He alleges that he was employed by appellants to render certain services, for which they agreed, among other things, to pay him as a fee a certain percentage of the money which they received; that they received the equivalent of a certain sum of money; that they have not paid him his percentage of it, and he asks the court to compel them to do so. The case is entirely different from all the authorities cited on the question of equitable lien, in that the money which he seeks to have paid to him is in the pocket of Mrs. De-

Winter, and he asks the court to compel her to carry out her promise to pay it to him. He does not show the items of notes and cash received by her, but insists that it must all be considered as cash, and then asks the court to say to her, "You must do as you agreed, and pay your attorney the fee promised him."

An equity court will not enforce specific performance of such an agreement as this, where the only thing sought is the payment of money, and a suit at law is just as adequate and complete a remedy.

There is no allegation that appellants are insolvent, but on the contrary the bill shows that about six weeks before it was filed, Mrs. DeWinter received over $13,000, and appellee's claim is only $1,900.

Appellee alleges that he *believes* appellants intend to defraud him, and that they will remove the fund from the District of Columbia. This is merely an allegation of a *state of mind*, and the demurrer admits simply his belief, and not their intention to defraud, or to remove the fund. Further, if his belief is justified, he can have an attachment at law, and thus prevent the removal of the fund.

In all cases where a lien has been decreed, the fund has been in the hands of an executor, or the Government, etc., and the court could get hold of it without putting its hand into the defendant's pocket and paying his debts for him. And the fee contracts did not expressly provide for the receipt of the money by the defendant, and payment by him to the attorney.

In the Ingersoll case, the fund was in the hands of the administrator, and the agreement was that "your fee shall be $100,000."

There is absolutely no difference in principle between the case at bar and the most common of professional employments,—collections upon a contingent basis. Surely, if A places a claim in my hands for collection, agreeing

to pay me a fee of 15 per cent. of the sum collected, and because of my efforts the debtor goes to A and pays the bill, I cannot sue A for my fee in equity! To maintain the contrary would be to abolish the test of equity jurisdiction and to open the equity courts to a multitude of cases where the remedy at law is plain, adequate and complete, and the defendant is entitled by the constitution to a trial by jury.

And the establishment of such a precedent would be attended with such evil consequences that the present case becomes insignificant as contrasted with the conditions which would follow from opening the door of equity to cases seeking merely the specific enforcement of personal promises to pay.

Respectfully submitted,

P. H. MARSHALL,
Solicitor for Appellants.

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1909

FLORENCE HUNT DEWINTER AND
NICOLAS DEWINTER,
Appellants,
vs.
HENRY G. THOMAS.
} No. 1964

SUPPLEMENTAL BRIEF OF APPELLEE ON RE-HEARING.

J. W. BELLER,
CONRAD H. SYME,
Solicitors for Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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(1) If there is a lien there is jurisdition in equity, the remedy there is more complete and adequate than at law. (2) The lien created by the contract exists upon the fund in the hands of the defendants, and can be enforced by a Court of Equity against the fund in their hands. (3) Attachment for failure to obey the decree would be for contempt, and not imprisonment for debt.

In the briefs heretofore filed we have discussed at length the question of an equitable lien, and have presented authorities sustaining, we believe, our contention that a lien was created by the contract in this case. We shall touch upon

that question only incidentally in this brief. We now respectfully submit the following arguments upon the other propositions outlined in the preceding paragraph.

I.

In Wylie vs. Cox, 15 How., 415, the Court said: "It is objected that equity can exercise no jurisdiction in this case, as an adequate relief may be obtained at law. There may be a legal remedy and yet if a more complete remedy can be had in chancery it is a sufficient ground for jurisdiction." That the remedy in equity in the case at bar is as far superior to the remedy at law as in the case just cited cannot be doubted. Under the circumstances as presented by the bill in this case, the fact that the fund is in the hands of the defendants adds much force to the contention that the remedy at law is inadequate and incomplete. (We shall presently show that that fact makes no difference in so far as the enforcement of the lien is concerned.) The demurrer admits that the defendants have no property except the legacy received under the will—personal property. (Bill, par. 11, Rec., p. 4.) It is admitted that the defendant Florence Hunt DeWinter, the legatee, expressed to the complainant the intention of remaining in Washington only temporarily. (Bill, par. 10, Rec., p. 4.) As bearing upon the intention of the defendants, the demurrer admits that, in an action at law growing out of the transactions upon which the bill in this case is founded, they have filed an affidavit which is wholly false. (Bill, par. 9, Rec., p. 4.) This is one of the grounds for complainant's belief that the defendants intend to fraudulently deprive him of his rights in the premises. (Bill, par. 11, Rec., p. 4.) Here we have the defendants, transients in this jurisdiction, with no property except personalty of a character which can be carried with them, in their pockets, as they go from place to place,

or easily secreted, or placed beyond the reach of the complainant. That the defendants intend to defeat the claim, and that a judgment at law will avail nothing we believe we have a right to urge from the allegations of the bill as a whole. Of what value would a judgment be with the defendants out of this jurisdiction, and the fund removed, dissipated or secreted—or even with the defendants here, and the fund gone? It is the arm of the equity court which can reach the parties and the subject matter pending the final decree which makes, or helps to make, the remedy in equity more complete and adequate than that at law. At law there could be at best nothing more than a general judgment against the defendants. The decree in this case forecloses the lien upon the fund (which admittedly the defendants have), and directs them to pay *out of that fund* what belongs to the complainant by virtue of the lien foreclosed. Herein lies the superiority of the decree over a judgment at law. Counsel for appellants in his argument sought to read out of the decree the words "out of the fund," but in those words lies the strength of the decree. A court of law would be powerless to grant such a complete remedy. Equity can lay hold upon the very fund in controversy and, having determined the respective rights of the parties concerning it, enter a decree fully adjusting those rights and granting complete relief. Mr. Chief Justice Fuller, speaking for the Court in the case of Kilbourn vs. Sunderland, 130 U. S., 505, 514, said: "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances." In Clark vs. Flint, 22 Pick., 231, 238, the Supreme Judicial Court of Massachusetts said: "On what plausible ground can it be contended that a judgment against an insolvent contractor is an adequate remedy? It would be manifestly against equity and justice for a court to decline

jurisdiction in such a case. If the party injured by a breach of a contract cannot avail himself of his remedy at law *for any beneficial purpose, or if it be doubtful whether he can or not, a court of equity if it can relieve him, ought certainly to interpose.*" (Italics our own.)

From Pomeroy's Equity Jurisprudence, 2d Ed., Vol. 1, pp. 190-192, we quote the following, which is directly applicable to the case at bar:

> "* * * It is one of the distinctive and central principles of the equity remedial system that it deals with property rights—estates, interests, liens—rather than with the mere *personal* rights and obligations of the litigant parties. This tendency of equity to base its remedies upon the rights of *property,* in their various grades, from complete estates to liens or charges, is exhibited in the clearest manner in all its suits brought to enforce the rights and duties growing out of contracts. Although the contract is executory, even though it stipulates only with respect to things not yet in existence—things to be acquired in future—the remedial right is worked out by conceiving of a present ownership, interest, lien, or charge, as arising from the executory provisions, or a present possibility which will ripen into such an interest, and by establishing this proprietary right, protecting and enforcing it. The decree, with a few exceptional cases, passes over the *personal* rights of the plaintiff, and the personal obligations of the defendant, deals with rights or interests in property, and shapes its relief by conferring rights, or imposing duties growing out of or connected with some grade of property. Even when the executory contract creates what at law would be a debt, and when the recovery at law would be a general pecuniary judgment, the equitable remedy views the debt as an existing fund, and awards its relief in the form of an ownership of or lien upon that fund. A general pecuniary judgment to be recovered from the debtor's assets at large—as an award of damages—is only granted by a

court of equity under very exceptional circumstances. Another quality of the distinctively equitable remedies, connected with and perhaps growing out of the one last mentioned, is their *specific* character, both with respect to substance and form. Except in actions to recover possession of land or of chattels ("action of right," "ejectment," or "replevin"), the legal remedies by action are all general recoveries of specified sums of money, which may be collected by execution out of any property of the debtor not exempted. The equitable remedies, with a few exceptions, are specific, deal with specific things, land, chattels, choses in action, funds; establish specific rights, estates, interests, liens and charges in or over these things; and direct specific acts to be done or omitted with respect to these things, for the purpose of enforcing the rights and duties thus declared. Even when the controversy is concerning pecuniary claims and obligations, and the final relief is wholly pecuniary, the equitable remedies are administered by regarding the subject-matter as a specific fund, and by adjudging such fund to its single owner, or by apportioning it among the several claimants. It is the distinctive feature of the system, which gives it a superior efficacy over the legal methods, that it ascertains a rightful claimant's interest in or over a specific thing, land, chattels, choses in action, debts, and even money in the form of a fund, and follows it through the hands of successive possessors as long as it can be identified. The two qualities which I have thus described, that equitable remedies deal with property rights rather than with personal rights and obligations, and that they are specific in their nature, are the peculiar and important features of the system, and give it the power of expansion and of application to an unlimited variety of circumstances, which enables equity to keep abreast with the progress and changing wants of society.

The Code, Section 1104, provides for the same writs of execution upon decrees in equity as upon judgments at law. If the decree in this case is no better than a judgment at

law would be (and we think we have shown conclusively that it is), it is certainly as good, and should be affirmed and enforced, if for no other reason, upon the theory of avoiding circuity of action. If this decree should be reversed, and the complainant resort to an action at law, obtain a judgment, and execution be returned unsatisfied, a bill in equity, upon the theory of a lien upon the fund, could be maintained and a decree in aid of execution awarded.

Another principle which seems to us applicable to this case is the well settled rule that when a court of equity has jurisdiction of a cause for one purpose, it will retain such jurisdiction for all purposes. Equity certainly has jurisdiction in this case for the purpose of foreclosing the lien. See Kelly vs. Galbraith, 186 Ill., 593, 608, 609.

II.

No one will doubt the authority and power of the Court of Equity to have appointed a receiver pending a determination upon the facts, had the bill been answered instead of demurred to, and if the Court has power to appoint a receiver and direct the defendants to pay over to him so much of the fund as will be necessary to satisfy the claim of the complainant, if finally established, it can not be doubted that the Court, having decided upon demurrer (defendants electing to stand on the demurrer), that a lien in favor of the complainant was created by the contract, can properly enter a decree foreclosing the lien and directing the defendants, who admit that they have the very fund upon which the lien exists and no other funds, to pay over to the complainant the portion of the fund now determined to belong to him by virtue of the lien arising out of the contract and which is now foreclosed.

If any question of tracing the fund could arise in this case, authorities are abundant that money can be followed

in equity to the same extent as any other property. It may be more difficult in some cases to identify it, but the doctrine is the same.

In re Hallett's Case, 13 Ch. Div., 696, 720;
Union Stock Yards Bank vs. Gillespie, 137 U. S., 411, 421;
Farmers' and Mechanics Bank vs. King, 57 Pa. St., 202, 208.

But there is here no question of tracing the fund, and no rights have intervened. The defendants admit upon the record and in Court by their counsel that they have the identical fund within the jurisdiction of the Court—in the pocket of defendant, as counsel puts it. The bill alleges that the defendants at the time the bill was filed had no property except the very fund in controversy, and that they had at the time of receiving this fund no other money or property, so there can not be even the question of the fund being mixed with other funds. The bill alleges also that the fund is within the jurisdiction of the Court.

After a most careful and exhaustive research, we are satisfied that there is not a single authority in the books holding that a lien, not dependent upon possession, is lost or waived by the party against whom the claim exists getting possession of the fund to which the lien attaches. The authorities, in so far as they touch upon the question at all, are to the contrary, and we need go no farther than the case of Walker vs. Brown, 165 U. S., 654, already cited upon the question of a lien generally. The Court in that case, in fixing "the legal principles by which the question of equitable lien is to be determined," quoting with approval from Pomeroy's Equity Jurisprudence, Vol. 3, par. 1235, said, in substance, that every express executory agreement in writing whereby the contracting parties sufficiently indicate an intention to make some particular fund (among other

things), therein described or identified, a security for a debt or other obligation creates an equitable lien upon the property so indicated, which is enforcible against the property in the hands not only of the original contractor, but his heirs, etc. A stronger statement of a general principle of law could not be made, and it is, we submit, exactly in point—as applicable to the case at bar as if the very case had been before the Court.

That the lien in Walker vs. Brown was enforced against a bond in the hands of the defendant, does not distinguish that case from the present case. Suppose Brown had sold the bond, and had had in his possession the money received for it. The lien would have as certainly attached to the fund as it did to the bond.

In the present case, the defendant, Florence Hunt DeWinter comes to the complainant with the statement that she is a beneficiary under a certain will, that a fund of several thousand dollars has been bequeathed her, and that a question as to the validity of the will has arisen and a contest is threatened, unless a compromise can be made. If the will stands, she will get the entire fund bequeathed her; if a compromise is necessary, she will get less; if the will is contested and defeated, she will, of course, get nothing. She wishes to employ the complainant to represent her in the matter; she pays him nothing and offers nothing except in the event of his success in preserving or recovering the fund for her, in which event she offers to give him for his services a portion of the specific fund described. Complainant accepts the employment, and a contract is entered into clearly identifying and describing the fund and containing an express agreement and promise, on the part of the owner of the fund, to pay to complainant, in the event of success, 15 per cent of the very fund bequeathed her, and with reference to which the contract was made—the fund which the attorney must preserve, if he is to receive any compensation

for his services. Certainly that agreement sufficiently indicates an intention to make that particular fund a security for the obligation incurred by the legatee. Then the case comes within the doctrine in Walker vs. Brown, and the lien is enforceable against the fund in the hands of the defendants. The attorney had no right to look to anything except that fund for his compensation, and, conversely, he had an absolute right to rely upon the agreement that in the event of the fund finally coming to the legatee, 15 per cent of whatever amount was received was to be his for his services. The services were performed, and the contract beyond all question created a charge or lien upon the fund described therein, enforceable in equity—not a lien arising from an equitable assignment; we do not confuse the terms (we use the term "equitable assignment" always in the sense in which it is used in Christmas vs. Russell, 16 Wall., 69, referred to on page 6 of appellee's brief in support of his motion for rehearing—the strict sense of the term), but an equitable lien just as binding upon the fund as one growing out of an equitable assignment, and which when foreclosed just as clearly and certainly sets apart a specific amount out of the fund, or portion of the fund, as the property of the party in whose favor the charge upon the fund existed. There was no assignment of a portion of the fund by an order upon which payment could have been demanded from any holder of the fund, even against the protest of the debtor, but there was a charge upon the fund for 15 per cent of it, whatever it should finally amount to, and the amount became fixed upon the approval, by the Court, of the final account of the executor, for not until then was it known what would be received by the legatee. We quote the following from the brief of the petitioner in the Ingersoll case, which, because of the eminence of the counsel on the brief, we think is worthy of consideration: "The case of Wylie vs. Cox has been used as authority for maintaining

the attorney's equitable lien in a great number of cases in this country (see Notes on U. S. Reports, Vol. 5, page 333). This leading case emphatically refutes the suggestion that an attorney's equitable lien must be the product of a special assignment."

The defendants in the present case took the fund with the charge or lien impressed upon it, knowing that a portion of it was pledged to the complainant as compensation for his services. They admittedly had the very fund, and no other in their possession within the jurisdiction of the Court when the lien was foreclosed. The contract, to which they were parties, created the lien, and the decree of the Court, the Court having jurisdiction of the parties and the subject matter, foreclosed it. Can it be that the owner of the fund —the party with whom the contract concerning it was made —can by obtaining possession of the fund defeat the lien which by operation of law upon the contract has been stamped upon it? All reason, even if no authority had been cited, is certainly against such a proposition. If that were the law, contracts for fees payable out of the fund recovered would be of little value. The owner of the fund by making a settlement with the judgment debtor or whoever might be the holder of the fund could absolutely defeat the lien. This would be peculiarly true in cases like the one at bar. The legatee by obtaining from the executor payment of a legacy could defeat the lien.

A case is easily imaginable where the only safe course would be to wait until the final account was passed and the legacy paid before attempting to enforce a lien. It would be easily within the power of persons, so inclined, to make a paper compromise and reduce the fee of the attorney, if an attempt should be made to reach the fund before it was known what the legatee ought to receive. This would be only another step for persons who intended to defeat the claim of the attorney.

A third person, with notice of the contract creating the lien, by getting the fund into his hands could not destroy the lien. Then clearly the very party to the contract—the person obligated under it; and who has agreed that the attorney should have a portion of the fund in payment of the obligation—and who has complete knwledge of the lien, can not defeat it by getting possession of the fund. Equity regards as done that which ought to be done.

In the case of Kennedy vs. Steele, 71 N. Y. S., 237 (Appellee's original brief, p. 9), the fund came into the hands of the defendant, and the Court held that the complainant had a lien upon it for the amount agreed to be paid him for his services.

In the case of Ingersoll vs. Coram the theory of the bill was, as in the present case, that the lien was created by virtue of the contract and the performance of the services, and that it was existing and in force and effect upon the shares of the estate acquired by the five heirs as the fruits of the services rendered by Mr. Ingersoll, in whosoever hands the same may be. A lien was decreed upon the money and bonds "in the custody of whomsoever the same may come." We submit that the lien would still have attached to the fund if it had been in the possession of Root and Coram when the bill to foreclose was filed. In fact, a question in the case was whether the lien could exist upon the funds under the control of the Probate Court, and care was taken in the decree to make no disposition of the fund except subject to the rights of the Probate Court in the premises. If the fund had been paid over to Root and Coram and found in their possession, there would have been a plainer case. One of the questions submitted by the Supreme Court to counsel in the Ingersoll case (as appears from the notes to the opinion) was: "Has the Circuit Court jurisdiction upon the pending bill either in its present form or as it might be amended, to direct that Leyson, Root,

Coram, or either of them, should hold any property coming into their hands by order of distribution of the Probate Court, upon the trust to satisfy the claim of the complainant?" This question shows that the administrator, Leyson, and the defendants, Root and Coram, were in the same class with respect to the effect upon the lien the possession of the fund by either of them would have. And the question must have been affirmatively satisfactorily answered, for Leyson had the fund.

We call attention in passing to the fact that the lien in the Ingersoll case was first held to exist, upon demurrer to the bill. The Circuit Court then said: "Upon all settled rules with reference to the construction of such instruments we cannot doubt that this one of August 17, 1891, created a lien on the funds therein referred to in behalf of Mr. Ingersoll." The instrument referred to was the letter of Root and Coram to Ingersoll. Counsel for appellants contends that the case is not in point because it was not decided upon demurrer.

Counsel for appellants states on page 17 of his brief on rehearing that appellee has considered the Ingersoll case as opposed to the Trist case. On pages 33 and 34 of our brief in support of the motion for a rehearing we have sought to distinguish the cases, and have nowhere considered the Trist case as opposed. That case is no more opposed to the Ingersoll case than is any other case dealing with dissimilar questions.

III.

If the defendants in this case should refuse to obey the decree of the Court, attachment and imprisonment (if necessary to resort to that) would be for contempt, and not imprisonment for debt. The remedy awarded is simply executed through the parties; they are directed to pay over to the complainant a specific thing—a specific part of a spe-

cific fund—ascertained to be in their possession. The relation is not that of debtor and creditor. The cases of Kenesaw Mills Co. vs. Walker, 19 S. C., 104 and *In re* Burrows, 33 Kan., 675, already cited to the Court, are strong cases and in point. In the South Carolina case the Court said: "It (the order of the Court) was in effect an order to deliver a specific thing—specie or bank bills to a certain amount—ascertained to be in the possession or under the control of the defendant; and the superadded order to attach him in case of disobedience, was not within the provision of the constitution against imprisonment for debt."

The quotation from Pomeroy's Equity, *supra,* is also in point upon this branch of the case.

Respectfully submitted,

J. W. BELLER,
CONRAD H. SYME,
Solicitors for Appellee.

Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia

NO. 1964

FLORENCE HUNT DE WINTER AND NICHOLAS DE WINTER, APPELLANTS

vs.

HENRY G. THOMAS

Reply to Supplemental Brief

P. H. MARSHALL,
for Appellants

THE SAXTON PRINTING CO.

Court of Appeals, District of Columbia

FLORENCE HUNT DE WINTER AND
NICHOLAS DE WINTER,
Appellants, } No. 1964.
vs.
HENRY G. THOMAS.

REPLY TO SUPPLEMENTAL BRIEF.

Appellee's supplemental brief evades the question before the Court. It *assumes* that the fee agreement created a lien, and the arguments are all based upon this assumption. Having taken for granted the very question in dispute, counsel devote their efforts to drawing conclusions from a false major premise, so that the whole argument falls with the collapse of its foundation.

That no lien was created by the fee contract, and therefore equity has no jurisdiction of this case, is the position steadfastly maintained by appellants, and it is upon this question of jurisdiction that the case hinges, yet appellee's arguments all proceed upon the theory that the equity court *had* jurisdiction, and therefore can enforce the lien which they *assume* to have been created.

That this fee agreement created no lien is the doctrine of Wright *vs.* Ellison, Dillon *vs.* Barnard, Trist *vs.* Child, Porter *vs.* White, and from these authorities it is plain that the Supreme Court of the United States has consistently held that such contracts do not create liens which can be enforced in equity. No case could be more in point than Trist *vs.* Child, and language could not be plainer than that quoted from Dillon *vs.* Barnard on page 11 of appellant's brief on rehearing.

Counsel argue that "the arm of the equity court" should reach the defendants because the demurrer admits (1) that they have no property except the legacy; (2) Florence Hunt De Winter expressed the intention of remaining in Washington only temporarily; (3) they have filed a false affidavit in the law suit. Certainly these present no elements of chancery jurisdiction, for, if so, any debtor might be proceeded against in that court if he had no real estate in this District, threatened to leave it, and when sued at law filed a sufficient affidavit of defense under the 73rd rule.

That the decree to pay "out of the fund" amounts to nothing is plain (1) because one dollar is as good as another, and appellee would not desire, nor would he be permitted to complain that although paid the amount decreed to him, the money was not a part of that delivered to Mrs. De Winter by the executor; (2) because the Court could not determine whether or not that part of the decree had been obeyed, as it could not tell a dollar received from the executor from one borrowed from a bank on collateral. As all the complainant desires is the sum claimed in his bill, irrespective of the source from which it may come, and all the decree amounts to is to require appellants to pay him that sum, it is the exact equivalent of a judgment at law.

Counsel cite the cases of Kilbourn *vs.* Sunderland, 130 U. S., 505, and Clark *vs.* Flint, 22 Pick., 231. The first involves an accounting, and the second was a suit against an insolvent contractor. Neither has any application here, for no accounting is necessary or prayed, and appellants are not insolvent. One of them received $13,000 just before appellee filed his bill, and he says they still have it, and that it is within this jurisdiction.

His position appears to be (pp. 5, 6, 7 of his brief) that where a strictly legal demand exists, but the debtor is execution proof although possessed of ample funds, equity ought to assume jurisdiction and order the debtor to settle or go to jail. As said in Rees *vs.* City of Watertown, 19 Wall., 107, where execution of a judgment at law could not be had, although the debtor had funds, "the want of a remedy and the inability to obtain the fruits of a remedy are quite distinct," and the Court held that such situation created no jurisdiction in equity. And persons with $13,000 are not execution proof, as a rule, and the bill does not allege that appellants are.

His quotation from Pomeroy, on page 4 of his brief, is against him, for it states in the beginning that equity deals with *property* rights, and not mere "personal rights and obligations." The Trist case, as well as the other Supreme Court decisions heretofore cited, expressly holds that contracts such as the one in this suit are mere "personal agreements for breach of which the remedy is at law and not in equity, and the defendant has a constitutional right to a trial by jury."

Appellee says (page 5), that if this decree is no better than a judgment, nevertheless it should be affirmed to prevent "circuity of action." In other words, although the remedy at law is plain, adequate and complete, appellee should recover in equity because he proceeded there

improperly, and if turned out of that court will have to go where he belongs—before a jury.

Kelly *vs.* Galbraith, 186 Ill. App., 593, cited by appellee, was a case where a bill in equity was filed to correct a mistake in a lease. This, of course, is a well recognized ground of chancery jurisdiction. The Court also decreed payment of arrears of rent, under the familiar doctrine that having acquired jurisdiction to correct the instrument, they would afford complete relief. The case has no bearing whatever upon this one for equity never acquired jurisdiction here.

If equity has no jurisdiction in this case, then it had no power to appoint a receiver. If the agreement is a "mere personal one," and creates no rights capable of being adjudicated in chancery, that court never acquired jurisdiction, in the matter for any purpose. And appellants raised the question of jurisdiction promptly, and in the first instance, by the demurrer.

Counsel seem to regard the decision of the lower court that a lien was created by the contract as binding on this Court, and that the only question left is what they term "foreclosing the lien." This latter they wish to accomplish by a decree requiring the specific performance of the contract to pay appellee the fee claimed.

In re Hallett's case, 13 Ch. Div., 696, was a litigation between several claimants of trust money on deposit in a bank. It has no bearing whatever on the case at bar.

Nor is the case of Bank *vs.* Gillespie, 137 U. S., 411, in point. The bank had received deposits from a factor, and sought to appropriate the same in settlement of an overdraft by the factor. The Court held that the testimony showed that the bank was chargeable with notice that the money which it thus sought to appropriate was not the money of the depositor but belonged to his prin-

cipal, and that as Gillespie (the principal and true owner) *had no remedy against the bank at law,* because the contract created by the dealings in a bank account is between the depositor (the factor) and the bank alone, and no one can sue *at law* for a breach of that contract except the parties to it, the remedy of the principal was in equity. This is simply an illustration of the test of equity jurisdiction, there being no remedy at law. The point of the decision is on page 422 of the opinion.

In the case at bar there *is* a contractual relation between the parties, a contract being the foundation of appellee's claim, and judgment at law *can* be obtained, and affords complete relief.

That an equity court can render a decree for money, in a proper case, is beyond dispute, but, in addition to a mere money demand, there must be some relief sought which cannot be had at law, as in above case, or Kelly *vs.* Galbraith, *supra,* or an action for accounting, etc.

Bank *vs.* King, 57 Pa. St., 202, is a similar case to Bank *vs.* Gillespie, except that under the Pennsylvania code, the plaintiff is permitted to "stand in a court of law on a mere equitable right."

As to Walker *vs.* Brown, 165 U. S., 654, and Pomeroy as therein quoted, it is sufficient to say that appellee had no intention, when this fee agreement was prepared, to obtain *security* for his fee, and it is submitted that this conclusion is demonstrated in appellant's brief on rehearing.

And attention is called to the fact that in Ingersoll *vs.* Coram, the Court approves Walker *vs.* Brown and quotes Pomeroy as therein cited, and also approves Trist *vs.* Child, so that it is apparent that there can be no conflict between these authorities. And as the case at bar is on all fours with Trist *vs.* Child, it must be controlled by

that decision. The Court expressly held that, in the Ingersoll case, the conditions of Wright *vs.* Ellison, 1 Wall., 16, were satisfied, and quoted the conditions as follows: "It is indispensable to the lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it." In Trist *vs.* Child, the Court in construing that contract (which was on all fours with the one in this case, except that additional stipulations here make it even more apparent that no security or lien was contemplated when the contract was made) cited Wright *vs.* Ellison as authority for the conclusion that no lien was created in the Trist case because there was *no* distinct appropriation of the fund. It thus appears that the Supreme Court itself has distinguished these cases, holding that there was no appropriation of the fund in the Trist case, and that there was such appropriation in the Ingersoll case, and therefore necessarily distinguished the case at bar from the Ingersoll decision.

Counsel would have the Court infer that appellants seek to defraud appellee, although the substance of this contention is that they have not paid his fee. Surely, it is no evidence of such purpose for them to insist upon his claim being passed upon by a jury, as required by the Constitution.

In Kennedy *vs.* Steele, cited by appellee, the fee was in the hands of a trustee under the express trust to hold it for claimant.

Kennesaw Mills *vs.* Walker, 19 S. C., 104, and In re Burroughs, 33 Kans., 675, are decisions founded upon the statutes of those States, and it is apparent that they can have no weight as authorities outside of the jurisdictions where these peculiar laws are in force. We have no "supplementary proceedings," or statutory remedies "in

aid of execution," and in both of above cases judgments at law were first obtained in the regular way, so that due process of law and the right of trial by jury had been afforded. It is that right which appellants insist upon in the case at bar, and of which they are deprived by the decree appealed from.

Pomeroy's equity, par. 1235, has been discussed herein and in former briefs. The same authority lays down the correct rule in this case in the note to paragraph 1283.

Respectfully submitted,

P. H. MARSHALL,
For Appellants.